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SOME POPULAR MISCONCEPTIONS OF THE PUBLIC SERVICE COMPANY LAW.

Although the Public Service Company Law has been in force almost seven years,[1] there are several false notions widely held as to the powers of the Public Service Commission, and of the provisions of the Law. This is strange in view of the fact that there are few, if any, citizens of the Commonwealth who are not affected to some degree by the orders of the Commission, and the operation of the Law.

1. The erroneous opinion which is most widely held is that the Public Service Commission has power to suspend the operation of a new tariff filed by a public service company which increases all or some of the rates which had previously been in effect. This conception was so widely held, that in the present investigation of the increased rates of The Bell Telephone Company of Pennsylvania the Commission through several of the newspapers clearly and succinctly stated the scope of its powers.

Every public service company has the right in the first instance to determine the rate, and to change that

[1]Act of 26 July, 1913, P. L. 1374, effective for all purposes 1 January, 1914.

rate when it deems it necessary. This power is inherent and a part of its charter grant from the State, and can be taken from it only by a clear legislative enactment.

The right to suspend the operation of proposed rates, pending the determination of their reasonableness, must be clearly granted to a commission by the legislature or it does not exist. The Commission having been created by the legislature has only those powers which have been expressly granted to it; it has no others.[2] The power of suspending the operation of the new rates pending an investigation has been given by statute to the Interstate Commerce Commission,[3] but has been withheld from the Public Service Commission of the Commonwealth of Pennsylvania.

In July of 1918, the then Attorney General, Honorable Francis Shunk Brown, was requested by the Commission to advise it on this question. In an exceedingly well reasoned opinion he advised,

> "that the Public Service Commission does not, under the law as it now exists, have the power to prevent a proposed change of rates becoming effective after thirty days have elapsed from the filing of such schedule, pending a hearing as to the reasonableness of the new rates, but that it may, by general rule, or special order, require the company to furnish its patrons a cer-

[2]For instance the Commission has no power to enforce specifically a contract made by a public service company and one of its consumers. **Public Service Electric Company vs. Public Utility Commissioners** (1916 N. J.) 96 Atl. 107, P. U. R. 1916 D, 107. See also **P. R. R. vs. Public Service Commission** (1916) 64 Pa. Sup. Ct. 586 and **Lycoming Edison Company vs. Public Service Commission** (1917) 67 Pa. Sup. Ct. 608, where it was held that the Commission lacked the power to compel a railroad to build a private side track.

[3]Section 15 of the Interstate Commerce Act—Act of 4 Feb., 1887, 24 Stat. 384, amended 29 June, 1906, 34 Stat. 599, Act 18 June, 1910, 36 Stat. 551, Act of 9 Aug. 1917, 40 Stat. 272. The periods of suspension are 120 days and six months.

> tificate or other evidence of payments made by them in excess of the prior established rate pending such hearing and determination."

The reasoning and conclusion of this opinion were adopted by the Superior Court in **City of Scranton vs. Public Service Commission**[4] where Judge Keller remarked:

> "That it was the intention of the legislature that the rate established by the public service company should take effect and be collectible pending a determination by the Commission as to its reasonableness, is seen from the fact that the act provides for a refund in case the Commission fixes a lower rate and fails to give the Commission power to suspend rates duly filed, posted and published."

This conclusion is not only sound as a legal proposition, but is also just. The consumers are amply protected in case the rates in the new tariff are determined to be unjust and unreasonable by the Commission.

Under Article II, Section 1 (f) and Article V, Section 4 of the Public Service Company Law, the Commission has the power to order a public service company to give to each of its customers "a certificate or other evidence of payments" for the excess of the new rates under attack over the old rates. Such a certificate protects the consumers for if the proposed rates are determined to be unjust and unreasonable and the old rates are reinstated the consumers can present these

[4](1919) 8 Pa. Corp. Rep. 321. See also the language of Mr. Justice Simpson in New York & Penna. Co., vs. New York Central Railroad, No. 154 E. D., January Term, 1920, decided 15 March, 1920, but not yet reported. But compare Suburban Water Co. vs. Borough of Oakmont, No. 70, October Term, W. D. 1919, now before the Supreme Court on re-argument, where the Allegheny County Court held that the rate under attack could not be enforced in an action at law against a borough pending the final determination of the reasonableness of the rate by the Commission. It is submitted that this ruling is erroneous.

certificates as their evidence of excess payments over the prior established rate in the petitions to the Commission for reparation.[5]

While the Commission has this power to order the company to issue such certificates, yet it will not exercise it in every case. There is no general order of the Commission which requires a company to issue such certificates and where no necessity exists for the issuance of the certificates, no specific order will be made. In **Mount Carmel vs. Edison Electric Illuminating Company**[6] the Commission ruled that where a company furnishes each consumer with a receipt which shows the amount which was paid for the service under the new rate, it will not order the company to furnish certificates of excess payment. This ruling is reasonable for if the new rates are stricken off and the old rates re-established, each consumer can readily determine the amount which he was over-charged and compel the company to refund to him this amount.

The same is true if the Commission in determining that the proposed rates are unjust and unreasonable does not order the old rates to be effective, but new rates which are less than the proposed rates.

Such procedure not only protects the consumers if the new rates are determined to be unjust and unreasonable, but also protects the company if the new rates are determined to be just and reasonable. This was aptly stated by Attorney General Brown in the opinion to which reference has already been made:

[5]Art. V, Section 5 of the Public Service Company Law. However, the petition for reparation must be filed with the Commission "within two years from the time when the cause of action accrued," i. e., two years from the date of the order declaring the new rates unreasonable and unjust.

[6](1918) 6 Pa. Corp. Rep. 552.

[6a]Such a thought runs through the opinion of the lower court in **Suburban Water Company vs. Borough of Oakmont,** supra note 4.

> "On the other hand, there would be no practicable method of reimbursing the company if the old rates were continued until the hearing was completed and then it was determined by the Commission that the new rates, as proposed, were just and reasonable; and a suspension of the new schedule until such determination might thus prove disasterous to the company, which is expressly authorized to 'demand, collect and receive fair, just and reasonable rates, fares, tolls and charges' (Article III, Section 1)."

2. Many are of the opinion that a public service company must apply to and receive from the Commission its approval of the new tariff, whether the rate is increased or decreased, before such tariff can go into effect.[6a] Nothing is farther from the fact. Thousands of tariffs and supplements to tariffs are filed annually and if the Commission were required to act upon each one before it finally became effective, the Commission would have little time to perform its regularatory duties.

Every public service company has the right[7] to change any tariff or rate which it has filed by merely giving both the Commission and its consumers the required statutory notice of thirty days[8] before the date the new tariff becomes effective. If the new tariff or supplement[9] is in proper form it is filed by the Bureau of Rates and Tariffs of the Commission as a matter of course.[10] If the tariff or supplement is not in proper

[7]Art. II, Section 1 (f) of Public Service Company Law.

[8]This same section gives the Commission power to allow tariffs to become effective upon less than thirty days' notice, if good cause is shown.

[9]When the company wishes to change one particular rate or class of rates in a tariff, it file sa supplement to that tariff which changes only that particular rate or rates and no other rates.

[10]Circular No. 5, and Tariff Circulars Nos. 5 and 6, of the Commission contain the rules for the form of tariff, and filing, posting and giving of notices.

form it is not accepted by the Bureau for filing. But this rejection is based on what may be called a failure to observe the rules of procedure. It cannot be rejected by the Bureau because the Bureau is of the opinion that either the rules or the rates of the company as contained in the new tariff are unjust, unreasonable, unjustly discriminatory or unduly preferential. Unless such matters are brought before the Commission either by a formal or informal complaint, the tariff will remain as it was filed. It can be changed only by the voluntary action of the company or by an order of the Commission after a hearing has been held.

To this broad rule there is but one exception. In Article II, Section 1 (f) it is provided:

> "That no rate, practice or classification which shall have been determined by the commission shall be changed or discontinued by the public service company, directly or through any change in classifications, rules, regulations, contracts, or practices, within a period of three years after such determination, without application to and the approval of the commission, of which application thirty days' prior notice shall be given in the said tariffs or schedules to the public."

The reason for this proviso is clear. After an attack has been made on the rates of a public service company and those rates have been determined either just and reasonable, or unjust and unreasonable, there should be a "period of repose." No change should be made in the determined rate without the express approval of the Commission. The consumers could not force a change in the rate as determined except by filing a new complaint. And this proviso deprives the company from exercising its otherwise unqualified right to change the rate within a period of three years.

The difficulty is however, to know when a rate has been "determined" by the Commission. It is not every

action of the Commission with respect to a rate under attack which makes that rate a "determined" rate.

For example: A public service company files a tariff increasing rates which will become effective after the statutory thirty days' notice to the public and the Commission. During that statutory period a complaint is filed against the rates alleging they are unjust and unreasonable. At the hearing the burden of proving that the new rates are just and reasonable is upon the public service company. After the public service company has introduced its evidence in support of the new rate, the complainant offers evidence to rebut it. If the Commission should determine that the new rates were unjust and unreasonable and order the company to install the old rates, there is no doubt that these rates are such as "have been determined," and they cannot be changed within three years without application to and approval by the Commission.[11]

On the other hand, suppose that the complainant refuses to prosecute the complaint after the company has introduced its **prima facie** case, and the complaint

[11]Ashland vs. Schuylkill Railway Company (1918) 6 P. C. R. 585. In New Castle vs. Mahoning and Shenango Railway and Light Company (1919) 7 P. C. R. 139, the Commission went further. The Commission had ordered a prior complaint to be dismissed and the company "permitted to collect its rates filed with the Commission" until a certain date after which the old rates were to be installed, unless the company could then show that it required "the revenue which the new rates produce." Although there was no specific finding that the new rates were just and reasonable, yet the Commission held that its former report and order "was a determination of the just and reasonable rates which the respondent company was entitled to collect," and that these rates could not be changed within three years without application to and approval by the Commission. But **quaere:** Can any rate be said to "have been determined" by a report and order of the Commission in which it does not affirmatively appear that the rates under attack are either unjust and unreasonable, etc., or just and reasonable, etc?

is merely dismissed by the Commission. Is this a determination of the new rates? Clearly not. There has been no adjudication of the rates. Nothing has been decided or determined. The complaint was dismissed because the complainant refused to prosecute his complaint. Although the dismissal of the complaint permits the company to continue charging the new rates, yet the action of the Commission did not "determine" its rates. If it were otherwise any one by filing a complaint within the statutory period of thirty days could seriously embarrass and deprive every public service company of its undoubted right to change its rates upon giving the required notice. Inasmuch as the complaint is made within the thirty days' period, the burden of proof is upon the company. The complainant is not compelled to produce one scintilla of evidence until the company has offered its evidence in support of its new rates. If the complainant then refuses to go on with the case, it is clear why the dismissal of such a complaint should not be regarded as a determination that the new rates were just and reasonable and so restrict the company from changing those rates for a period of three years except upon application to the Commission. To hold that rates in such cases were "determined by the Commission" would open the door to suspicious complaints.

The Commission has lately advised that in such cases, the rates are not "determined" and that the company may change the rates upon giving the usual statutory notice of thirty days without any application being made to or approval granted by the Commission. And it has also advised that where complaints against increased rates have been withdrawn, with the approval of the Commission, because the complainants and the company had reached an amicable agreement whereby the company reduced the proposed increased rate, that such rate was not a "determined" rate.

3. Some practioners before the Commission were of the opinion that the filing of a complaint against a proposed increase in rates within the thirty days' period cast the burden upon the public service company to prove not only that the increased rates are just and reasonable but also that all the allegations in the complaint are not true. This of course is not the law.

The Law is quite specific upon this matter, and provides:[12]

> "at any such hearing involving any proposed increase in any rate, the burden of proof to show that such increased rate is just and reasonable shall be upon the public service company."

Nothing could be clearer therefore, that if a complaint alleges the proposed rates are not only unjust and unreasonable, but also unjustly discriminatory and unduly preferential, the burden is upon the complainant to prove that the rates are unjustly discriminatory and unduly preferential. One of the basic principles of our jurisprudence is that he who alleges certain matters to be illegal must sustain the burden of proving his allegation. The Public Service Company Law relieves the complainant of only a portion of that burden and in only one instance, namely, of proving that the proposed rates are in fact unjust and unreasonable. Hence the complainant must prove his other allegations to be true. The same is true where such a complaint couples with it allegations as to the unsatisfactory nature of the service or the unreasonableness of the rules of the company.

The reason for compelling the public service company to prove the proposed rates are just and reasonable was that the proof, if it existed, was in the possession of the company. The reasonableness of rates de-

[12]Article V, Section 4.

pends, to a large extent, on the net return they will yield to the company upon the fair value of its property. All the facts to show this are in the possession of the company and it should produce them in support of its proposed rates. This reason does not apply, however, to the other allegations in the complaint. If the service is in any particular unsatisfactory, the complainant can show this very readily. The company cannot anticipate the specific attack. These facts are in the possession of the complainant.

There is also another point to be mentioned here. The Public Service Company Law places the burden of proving that "such increased rate is just and reasonable" upon the company only if and when the complaint is filed within the thirty days' period, or if within that period the Commission upon its own motion proceeds to investigate the propriety of such increase. If the complaint as to reasonableness of the rate is filed after the expiration of that period, the burden is upon the complainant to prove that the rate is unjust and unreasonable.

4. There is another erroneous opinion concerning the powers of the Commission, and some companies for a time were guilty of entertaining it. The opinion is, that the Commission investigates and affirmatively approves the issue of stocks and bonds by a public service company.

While this is the law in some jurisdictions[13] it is not the law in Pennsylvania. There are two views as to the method of regulating the issue of stocks and bonds of public service companies.

One view is that no public service company should be permitted to issue either stocks or bonds unless the

[13]For instance, Ohio, New York, Wisconsin, New Jersey, Maryland and California.

matter had been thoroughly investigated and approved by the Commission. The reason which underlies this view is, that inasmuch as the amount of the outstanding stocks and bonds is one of the elements to be considered in arriving at a fair rate value of the property, the Commission should have strict supervision over the increase of the capitalization or funded indebtedness, and no increase should be allowed except with the Commission's express approval.

The other view is premised on the theory that the value of the property upon which the public service company is entitled to a fair return is best obtained by an engineering valuation of the property; while the amount of the outstanding securities is some evidence of the fair value, yet it is by no means the best evidence. Under this view the Commission is not so vitally interested in the issue of securities. In addition, those who hold this view are in doubt as to the legal result which will follow from the approval of an issue of securities by the Commission. They argue that under the Fourteenth Amendment there is at least a possibility of the approval working an estoppel against the Commission. For example: A public service company has an outstanding bond issue of $200,000. Today if that company needs an additional $100,000 to carry on its service, the Commission in approving this issue, concerning which there is no doubt as to its **bona fides**, will also be approving the prior issue of $200,000 over which it had no control. At a later date, the Commission would be seriously handicapped if an engineering valuation showed that the fair rate value was only $200,000. The security of the bonds which the Commission had approved would be prejudiced by such a valuation. The doubt as to the effect of such an approval arises from the language of the Supreme Court of the United Sates

in **Willcox vs. Consolidated Gas Company.**[14] In that case a general statute of New York governing the consolidation of corporations, provided that the consolidation agreement was to state the "amount of its capital stock, which shall not be larger in amount than the fair aggregate value of the property, **franchises** and rights of such corporation." A gas company was formed by merger and consolidation under this statute and fixed the value of all its franchises at nearly $8,000,000. In an attack upon the constitutionality of a later act which fixed its gas rates, the value of the company's property upon which it was entitled to a fair return became material. The company claimed as an item of value the amount of this franchise value. Concerning this claim the Supreme Court, through Mr. Justice Peckham, said

> "at the time of the consolidation, the value of the franchises of the constituent companies was fixed by them at $7,781,000 and that amount formed part of the capital of the complainant for which it issued stock. The consolidation was affected pursuant to the state statute. The state has never questioned the validity or fairness of the valuation. Since the consolidation the stock so issued has been dealt in up to the present time as valid stock of the consolidated company capitalized pursuant to statute, at not more than the fair aggregate value of the property, franchises and rights, of its constituent companies. The state should not now be heard to question the value of the franchises at the time of the consolidation."

Inasmuch as the value of the franchise was estimated by the owners themselves without being subjected to any state supervision whatsoever, it seems exceedingly doubtful if the provisions of the general con-

[14](1909) 212 U. S. 19, 53L. Ed. 383. See, however, an article by the writer in **University of Pennsylvania Law Review, Vol. 64, page 173,** discussing this case.

solidation statute should be held to operate as an estoppel against the state when the question of the rate value of the property was raised directly. But the possibility of such a question arising is to be avoided, and therefore the Commission should not be placed in a situation which may at a later date estop it.

This latter view, called the "Hadley Plan" after President Hadley of Yale University, was adopted by our legislature. Under this plan, a public service company may issue as large an amount of stocks or bonds as it can sell. The only requirement of the Law is that the company

> "shall file with the Commission on or prior to the date of issuance * * * * * , a certificate to be known as a Certificate of Notification * * * * * ."[15]

If the company files the Certificate of Notification with the Bureau of Accounts and Statistics of the Commission on or before the date it issues the new securities, it has complied with the law. There is no investigation or approval of the propriety of the issue by the Commission. This certificate is quite a formal document and contains in detail the financial history of the company, the purpose of the issue, the amount issued, the price at which the securities are to be sold, all the rights, preferences and privileges the holders of the securities obtain thereunder and other data. There is a form for the issue of stock, and another for bonds. The certificate is verified by the affidavit of the fiscal head of the company.

It is quite obvious that such a method keeps the Commission fully advised as to the financing of public service companies. No company is likely to file a false certificate, not only because the officers in charge are

[15]Article III, Section 4 (b).

reputable business men, but also the criminal provisions of the Law are quite severe. This method accomplishes the same practical end as the other method, without raising the doubtful question of estoppel.

Of course, a public service company has the right under the Law to apply to the Commission for a Certificate of Valuation[16] before it issues its securities. If it adopts this procedure it is not necessary for it to file a Certificate of Notification for the securities covered by the Certificate of Valuation. To avoid the question of estoppel the Law specifically provides that the Certificate of Valuation[17]

> "shall be deemed to certify only to the fact that said securities were issued for money, labor done, or money or property actually acquired; * * * * * neither shall said Certificate of Valuation be deemed to require the Commission, in subsequently determining the rates to be charged for the services of said public service company, to provide a rate which shall be sufficient to yield a return on said securities."

Certificates of Valuation are not common, and the prevalent method of issuing securities is by filing the Certificate of Notification prior to the date of issue.

The above are what the writer regards as the most conspicuous misconceptions of our regulatory law. He has not attempted to discuss them exhaustively for such a discussion is beyond scope of this article. He does hope, however, that this article will lead the members of the Bar to study more carefully the provisions of this great statute and the reasons for its enactment, for all can say with Lord Coke that

> "The law is unknown to him who knows not the reason thereof, and the known certainty of the law is for the safety of all."

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[16]Article III, Section 4 (a).
[17]Article V, Section 21.

MOOT COURT

COMMONWEALTH VS. SOMERS.

Larceny—Joint Indictment—Separate Trials of Joint Defendants by the Same Jury on the Same Facts and Witnesses—Incompetency of Juror to Serve in Both Trials—Challenge for Cause.

STATEMENT OF FACTS.

Somers was indicted for larceny committed jointly with X and Y. X has been tried and found guilty. Some of the jurors in X's case sat on that of Somers.' The same witnesses appeared in both cases. The verdict was that Somers was guilty. Motion for a new trial, because he was not tried by an impartial jury.

Delesantro for Plaintiff.

Fox for Defendant.

OPINION OF THE COURT.

POLISHER, J.—The facts being rather vague, we are forced to presume that the defendant's counsel challenged the jurors in question before they were sworn, else there would be no case, since the failure to challenge a juror before he is sworn is a waiver of the challenge, if the cause exists and is known before the swearing, as was the case here. 11 Pa. 325; 5 Binney (Pa.) 339. Also, that the challenge was overruled.

The question to be decided is whether a juror who has sat in the case of a joint respondent based upon the same facts and testimony of the very same witnesses whose credibility he has already passed upon, is competent to act as a juror in the present case.

The only difference between the two cases,—namely, the trial of the other co-perpetrator and the present case—is the substitution of the present defendant for the other defendant. The facts are the same; the testimony establishing the facts is the same; the questions involved are the same. The above difference—the substitution of present defendant—is the only distingushing feature between the two cases.

The jurors in that case formed their opinion from the facts else they would not have been able to render a verdict. One opinion is applicable to one state of facts; and only one.

The defendant has a constitutional right to a trial by an impartial jury. The cause of challenge appears to have been that the juror had, in effect, prejudged the case, or had contracted a bias such as to interfere with an impartial judgment. The question is—has the defendant had an impartial trial? We think not.

In all the reported cases in this state, in which an alleged prejudgment has been made the cause of challenge, the examination of the juror has shown nothing more than the formation of an opinion from newspaper and other reports, or from reading the testimony given on a previous hearing or trial. In such cases the rule is well settled that "if from the examination of the juror, it appears that he has the ability and disposition to render a verdict on the evidence alone, the law adjudges him to be competent, notwithstanding it would require evidence to change his impressions or opinions formed from what he had heard or read about the affair under investigation;" 156 Pa. 304; 184 Pa. 274. An exception is, however, made of an opinion formed from hearing or reading the evidence on both sides on a former trial; "such knowledge excludes the idea of impartiality;" Allison vs. Commonwealth, 99 Pa. 17; Staup vs. Commonwealth, 74 Pa. 458; Ortwein vs. Commonwealth, 76 Pa. 414.

In Staup vs. Commonwealth, supra, the juror stated that he had formed an opinion as to the guilt or innocence of the defendant from reading the evidence on the previous trial but that "it would not affect or influence his judgment, if sworn as a juror." The Supreme Court held him incompetent.

The exception is—if the opinion is formed from reading or hearing evidence of both sides on a former trial. As was said before, the trial of the present defendant being so nearly identical with the trial of his co-perpetrator, it might very easily and reasonably be considered as a trial of the former case with the prisoners changed. The jurors formed fixed opinions about that case. The renewal of the facts necessitates a revival of the opinion formed thereof. It is highly improbable to suppose otherwise. The facts are a formula for the opinion; the opinion, hence, is fixed, as to that state of facts; and fixed opinions entertained by a juror previous to his entering a jury box cannot be taken off at will and hung up like an overcoat when he enters upon the trial of the case. Jurors are but men and may be affected by a previously formed fixed opinion without intending or even knowing it. Besides, few jurors are willing to acknowledge

publicly that they cannot act impartially. The law wisely delivers the accused from such peril. Stronger reasons for pronouncing a juror disqualified by prejudgment have seldom been presented than are shown in the present case.

In order to do justice to the defendant and conform with the provision of the Constitution for a trial by an impartial jury, we order a new trial since the jurors are incompetent and the former trial partial.

OPINION OF THE SUPREME COURT.

In Buck vs. Commonwealth, 107 Pa. 486, A, jointly indicted with B and C for highway robbery, was separately tried. He challenged a juror on the ground that the latter had been a juror in the case of Commonwealth vs. B, C and D, involving a different crime. The challenge was overruled because the former "was a different case and involved an entirely different state of facts;" that is, it was assumed that having found B and C guilty of a different crime, would not deprive them of impartiality, on the trial of A, charged with confederacy with B and C, in a different crime.

The objection to the jurors' impartiality here is, that they have found X, an alleged confederate of Somers, in the theft guilty, and that the same witnesses whom they decided to be trustworthy in the trial of X, have testified against Somers, and have been again adjudged trustworthy. Objections could have been made by a challenge, on the former ground, but not on the latter, since it could not be foreseen what witnesses would be employed by the Commonwealth, in the trial of Somers. We think, in order that the constitutional right of the defendant, to an impartial trial may be preserved, that objection to the use of the same witnesses may be urged, on the motion for a new trial. Possibly objection might have been made at the trial, to the witnesses as they were called, on the ground that, as to this case, before this jury, they were incompetent to testify. It would be difficult, however, to discover in precedents, any authority for thus objecting to the witness.

Were the jurors impartial? Each juror must be impartial. It is not enough that eleven are if the twelfth is not. One of the jurors had heard the witnesses in the former case charge X and Somers with the crime, and they believed them. We are not warranted in thinking that they believed these witnesses only in so far as they incriminated X; and that they disbelieved them, or at least did not believe them, when they connected Somers with X in the crime.

They have therefore found and in the solemn form of a verdict, declared the opinion that X is guilty on the same evidence by the same witnesses, as are now presented, in the trial of Somers. How then can we evade the inference that they had formed a fixed opinion as to Somers' guilt.

Having declared their belief of X's guilt, how can they fail to do the same as to Somers? The former opinion must abide with them, until overcome, but nothing has happened to overcome it. There has been a reiteration of the same testimony by the same witnesses.

Even if the formation of an opinion, solemnly announced, would not be an impediment to the formation of a different opinion, it is too much to expect in jurors the degree of courage that would be implied, in convicting one man on certain evidence, and in refusing to convict another man on the same evidence. The desire to maintain an appearance of consistency, would be an obstacle to impartial weighing of the evidence.

Paxson, J., expressed the judgment that, if a witness had been present at a previous trial of a man and thus was in "possession of the whole case" such fact would "exclude the idea of impartiality," Allison vs. Commonwealth, 99 Pa. 17; Staup vs. Commonwealth, 74 Pa. 458. Agnew, C. J., apparently thought that an opinion formed upon the same evidence substantially as will be given upon the trial "will have such fixedness and strength, as will probably influence and control the jurors' verdict," and divest him of impartiality; Ortwein vs. Commonwealth, 76 Pa. 414, 426. Much more would the "idea of impartiality" be excluded, if the juror had heard all the evidence in the earlier case and had expressed his inference from it in a verdict.

The same witnesses have appeared in both cases. They are testifying to the same facts. The earlier verdict has expressed the judgment of the jurors. Impartial as these were, at the first trial, they are no longer so at the second trial. They approach the second trial with conceptions already formed. They cannot make an appraisal of the evidence heard now without prepossession.

We think the able opinion of the learned court below has properly disposed of the case. Cf. Priestly vs. Arizona, 177 Pacific 137; 3 A. L. R. 1201. The judgment must be

AFFIRMED.

FACKEL VS. COAL COMPANY

Subjacent Support—Time When the Statute of Limitations Begins to Run—Right of Action Arises When Support Removed and Not When Subsidence Occurs.

STATEMENT OF FACTS.

Fackel owned farm land, underneath which was a stratum of coal belonging to the defendant. The defendant excavated the coal and as a result, the surface fell in at different places and buildings on these places were demolished. The last act done by defendant was done during February, 1912. The cave in did not occur until April, 1915. This action was brought April 20, 1919. The court refused to say that the Statute of Limitations barred the action and permitted the plaintiff to recover. Motion for a new trial by the defendant.

Bartram for Plaintiff.

Coglizer for Defendant.

OPINION OF THE COURT.

SLOBERMAN, J.—The only question involved in this case is whether the owner of the surface is wronged, in legal contemplation, from the date when the owner of the subjacent coal removes the coal without leaving sufficient support for the surface, or whether the tort dates only from the date when the subsidence of the surface occurs. An explanation of the right of support may aid in deciding this question.

The right of support is a right to the abstinence by the owner of the mine or lower stratum, from acts within his mine, that will affect the place of the upper stratum. It is a limit upon the usual powers of an owner for the advantage of a superjacent piece of land. This right exists whenever an upper and lower segment of the earth falls into the ownership of different persons, irrespective of any intention on the part of either, contractually expressed, that it shall exist. This is an absolute right arising out of the ownership of the surface. It is a common law proprietary right. Robertson vs. Coal Company, 172 Pa. 566; William vs. Hay, 120 Pa. 485; Penn Gas Coal Company vs. Versailles Coal Company, 131 Pa. 522; Niles vs. Penn Coal Company, 214 Pa. 547.

It is not necessary that defendant should have been negligent in his excavation or mining in order to be liable when his work causes a subsidence of the surface, or in other words, the taking away of all the supports or so much that what is left is insufficient, without substitution of artificial props, pillars, etc., is ipso facto negligent, or the caving in is in itself conclusive proof of negligence Pringle vs. Vesta Coal Company, 172 Pa. 438; Hill vs. Pardee, 148 Pa. 98; Jones vs. Wagner, 66 Pa. 429.

Now it clearly appears from the facts, that the subsidence was the result of the mining of the underlying coal, which mining had been done by the defendant immediately beneath the lot of the plaintiff; and that there had not been any mining done directly beneath the plaintiff's lot within six years from the commencement of this action, since the last act was done February, 1912.

The facts in the case at bar are exactly identical with those in Noonan vs. Pardee, 200 Pa. 474, with which it is on all fours. As this case will control the decision in the case at bar, it will be advantageous to quote at large from the opinion in that case, as rendered by Judge Dean: "A cause of action is that which produces or effects the results complained of. The subjacent owner in this case, at some time falied in duty to the owner of the surface of this lot. The mere fact that it caved in because the coal had been mined underneath, demonstrates this failure. When the coal was removed without leaving sufficient pillars or without supplying sufficient artificial props was the time when the subjacent owner failed in an absolute duty he owed to his neighbor above. And from that time dates the cause of action. This is the case although the owner of the surface may have been ignorant of the violation of his right to support."

The case of Lewey vs. Fricke, 166 Pa. 536, is clearly distinguishable from an action for failure to afford the support. In that case the defendant from an adjoining mine, had mined and removed the plaintiff's coal underneath his land, yet did not disclose the fact and plaintiff did not discover it until after six years had run, and it was held that the Statute of Limitations only began to run from the time of the plaintiff's discovery, because the mining of his coal was a wrong and the concealment of the wrong a fraud. He had no means of discovery; had no right of access to the mine to make observations and the defendant no right at all under his land; he had no reason to suspect or presume, that one who had no claim of right would wrongfully enter on his land and dig coal. But in the case at bar, the parties who mined the coal (as in Noonan vs. Pardee), had a right to do so; the surface owner, too, had a right of sufficient support; these mutual rights gave the surface owner access to the mine to see that his right was being maintained by the performance of the duty owing to him by the coal operator. The surface owner should make constant tours of inspection, and the courts will enforce this right of access if the mine operator denies it. So we must come to the inevitable conclusion, as laid down in Noonan vs. Pardee, that the cause of action arose when

the mine operator failed to furnish sufficient support. If the subsidence is wholly due to the removal of coal six years before suit is brought and failure then to leave sufficient support, (of which there can be no doubt in the case at bar), the action should have been barred and recovery refused. Since the mine operator failed to furnish sufficient support, the right of action was barred after the expiration of six years. The date of the "cave in" is not the date of the cause of action; that is only the consequence of a previous cause. There had been no mining under the plaintiff's land for more than six years; since the last act of mining was February 1912, and action brought April, 1919.

As a matter of fact, Noonan vs. Pardee, 200 Pa. 274, is the only case in Pennsylvania on this exact point, in which the Statute of Limitations has been held to run not from the date of subsidence but from the date of excavation. The right to support in Pennsylvania is a right simply to have the surface supported for six years after the removal of the coal.

Although the doctrine as laid down in Noonan vs. Pardee is a poor one and rather exceptional, and different from the general rule as laid down in all other jurisdictions, yet, there is no doubt as to its being the settled law in Pennsylvania. And as it is a rather recent decision (1901), we feel bound to follow the doctrine laid down, although it is not good law.

Our conclusion is, that the court erred in allowing the plaintiff to recover after the Statute of Limitations had run for six years. The motion for a new trial by the defendant should have been granted.

Motion for a new trial granted.

OPINION OF THE SUPREME COURT.

It has been held by the Supreme Court, that, when support to the surface is removed, the act of removal, and not the caving in of the surface, which may not occur for 5, 10, 15 or 20 years thereafter, is the cause of action. Noonan vs. Pardee, 200 Pa. 474; Fischler vs. Pennsylvania Coal Company, 218 Pa. 82.

The inference is drawn that the action by the surface owner, must be brought within six years from the occurrence of this cause.

Strange to say, Noonan vs. Pardee, alleges that the cause is not a cause. It asserts that an action cannot be brought for a withdrawal of the support, until the actual caving in so that, if

that caving in does not occur till six years from the ablation of support, there never can be a successful suit.

The case also says that, not the owner of the land, when the cause of action arises, viz, the withdrawal of support, can sue, but only the owner, when the cavein occurs.

This decision has awakened astonishment in two hemispheres, but it has not been retracted. The learned court below has submitted to it. We must do likewise. The judgment is

AFFIRMED.

COMMONWEALTH VS. CONWAY.

Larceny—Evidence—Admissibility of Evidence of Former Similar Crime—Possession of Another's Property as Evidence of Larceny—Poverty of Defendant as Motive for Larceny.

STATEMENT OF FACTS.

Indictment for larceny from X's house. A week after the theft several things, such as watches, gold chains, cuff buttons, ets., were found upon Conway's person. But none of these things were stolen from X's house. Objection was made to the introduction of this evidence.

OPINION OF THE COURT.

HAND, J.—It is the opinion of the court that the objection must be sustained. Such evidence is admissible if it tends to prove the issue or constitutes a link in the chain of proof. In this case it clearly does neither. This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to principal facts. In this case the fact that the defendant had jewelry on his person a week after the alleged offense, and none which having been stolen from the house mentioned in the indictment certainly affords no such reasonable presumption.

In the case of Commonwealth vs. Haines, 257 Pa. 289, which was decided in 1917, Justice Mestrezat said: "It is fundamental that a defendant can not be convicted of an offense with which he is charged because he had committed another offense unconnected with that for which he is indicted and evidence of his participation in another crime is inadmissable unless such close connection can be shown that if the defendant is guilty of one he is also guilty of the other."

The general rule is that on prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused has committed another crime wholly independ-

ent of that for which he is on trial even though it be a crime of the some sort is irrelevant and inadmissable. Commonwealth vs. Biddle, 200 Pa. 647; Commonwealth vs. Wilson, 186 Pa. 1; Commonwealth vs. Saulsbury, 152 Pa. 554.

If the evidence forms part of the same transaction or is used to show knowledge, intent or identity of the defendant it is admissible. But the evidence of this case was not used for any of these purposes. In Comonwealth vs. Saulsbury, Chief Justice Paxson said: "Evidence proving a previous commission of an offense of the same nature must be excluded."

In Commonwealth vs. Wilson, 40 Atl. 283, it was held that evidence of another crime establishing connection with the crime in the indictment was admissible; but Williams, J., said, "the admission of testimony of witnesses called to prove an attempt by the defendant to rob one Swab, the said occurrence happening three weeks after the indictment, will be rejected."

It is an established rule governing the production of evidence that the evidence offered must correspond with the allegations and be confined to the point. 10 R. C. L. 927. See also to this effect Taylor on Evidence 230 and Greenleaf on Evidence, par. 50 and 51.

The plaintiff cites State vs. Wilson, 84 Pac. 409. This case dealt with the shifting of burden of proof when cattle were found in the possession of the alleged thief and with evidence received from a bribed jury. The Commonwealth also cites Walker vs. State, 127 Ga. 48. This case dealth with forgery. Neither case is analagous with the case at bar.

It is clear that such evidence as the prosecutor here attempted to introduce cannot be admitted unless (1) it tends to show connection with the crime in the indictment; (2) it forms a part of the same transaction or (3) it tends to show knowledge, intent or the identity of the defendant. It is clear that the evidence that the prosecutor attempted to introduce, comes under none of these three heads. Were it admitted it would tend to draw the minds of the jurors away from the point in issue and to excite prejudice against the defendant. Another reason is that the adverse party having no notice of such evidence would not be prepared to rebut it. It would destroy the presumption in the minds of the jury that, in respect to the particular crime in the indictment the defendant is innocent until he is shown guilty by proof of facts alleged in said indictment.

Objection sustained.

OPINION OF THE SUPERIOR COURT.

Watches, gold chains, cuff buttons, etc., were found on Conway's premises. Were they legitimately acquired or not? If legitimately, the finding of them could have no value, in this investigation. If there was evidence, not disclosed in the case stated, of the poverty of Conway, of his having no remunerative work, so that his possession of such articles would justify a suspicion of their having been stolen, that possession would tend to prove, associated with other evidence, that those articles had been stolen by Conway.

But, let us suppose that we had more than a suspicion of the theft of these articles, that the evidence warranted the belief of such theft, would such evidence be admitted in the present case? It would show that Conway had probably stolen these articles. But, can we show that the defendant has committed one theft, in order to show a larcenous disposition? Nothing is better settled that we cannot. If indeed, we know that a man has stolen once, it is easier to believe that he has been the thief, when something else has been stolen. But the state denies to itself the use of proof of one crime, in order to establish the commission of another, in this way.

So far as we can see, no other was intended to be made by the jury of the supposititious theft of the gold chains, etc., as a basis of inference that the defendant probably committed the theft from X's house. Henry Pa. Trial Evidence, p. 39. Such use is inadmissible.

Our attention has been called to Massachusetts vs. Coyne, 228 Mass. 269; 117 N. E. 337, in which evidence similar to that offered in this case was given. With all that is said therein, we cannot concur. The only apparent object of the evidence here, was to suggest that another theft had been committed by the defendant and that was an illegitimate one.

We must, therefore, agree with the learned court below and its judgment is

AFFIRMED.

BOWMAN'S ESTATE

Ejectment—Joint Executors—Joinder of all Executors Necessary to Pass Good Title to Decedent's Real Estate.

STATEMENT OF FACTS.

Bowman by will directed that his son, John, should occupy his house until such time as his executors (three in number) should make sale of it. Two years after his death, two of these executors conveyed the house to X, without the co-operation or consent of the third executor. X took possession, expelling John, who brings this ejectment to recover possession.

Shutter for Plaintiff.

Phillips for Defendant.

OPINION OF THE COURT.

SCHNEE, J.—The principal question presented by the above case has either been overlooked or evaded by the learned counsel for the defendant, who contends that the sale by two or three executors to the defendant vested the title in the latter.

It was well established at common law, and it is likewise true today, that upon the death of an owner of real estate, the title of the owner vested at once in the heirs or residuary legatees. Accordingly, an executor or administrator, as such, could not maintain a real action to recover possession of the land of the deceased. (4 Mass. 356; 32 Pa. 495.)

The facts in the above case warrant the belief that the executors were entrusted with the bare power of sale only, title remaining in the heir who was "directed * * * * * to occupy the house until such time as his executors should make sale of it."

The language above quoted shows the primary intent of the testator to have the possession of the house and title thereto vested in the son until such time as the executors, by their act in selling the property, should divest the title and possession from the son. To illustrate the logic of this conclusion: If the executors never sold the property, there would be no person or

persons in existence who could dispute the title of the son, John. The deceased did not vest title in the executors with the power of sale, but merely left the title in the possession that it would have been in the absence of the power given to the executors to sell, viz., in his heir. The power given to the executors to sell the property merely gave them the right to alienate the title from the son.

The rule is well settled that where a testator authorizes his executors to sell and convey lands, without specifically empowering anyone or any part of the executors to severally convey the lands, a deed not executed by all of the executors does not convey a valid title. In most cases, the testator appoints several executors with the express purpose of having them act jointly only, so that the estate will derive the benefits of the check in balance, which would naturally operate where there were two or more persons; so that before any definite action could be taken, the concurrence of all of the executors would have to be secured.

The following cases have held that where a power of sale is vested in executors, all of the executors must join in the conveyance, unless their renunciation appear of record: 92 Pa. 221; 254 Pa. 231; 4 Ky. 484; Section 28 (D of the Fiduciaries Act).

When executors are given a mere power of sale of realty without being given the title to it, the title vests in the heir or residuary devisee, until a valid sale is affectuated. 105 N. Y. 185; Tiffany, page 605.

Without the joinder of the third executor in the case before the court, no title therefore passed to the defendant, inasmuch as title remained in the plaintiff until properly and legally divested from him by a valid sale of the executors, and no such sale being present in the above case, the action of the plaintiff is proper and he alone can successfully prosecute the action of ejectment.

The court is of the opinion that the counsel for the defendant has misconstrued section 28a of the Fiduciaries Act. This section is applicable to sales and conveyances only and when

properly made by all of the executors. It therefore has no application to the case at bar.

Judgment is accordingly entered for the plaintiff.

OPINION OF THE SUPREME COURT.

There were three executors. They, the three, were to make sale, if sale was made at all. It must be assumed, said the court in a similar case, from the appointment of a man as one of three executors, that the testator "reposed confidence in his judgment and business capacity," and desired that he "should participate in fixing the price and securing a purchaser for the real estate." Simmons Estate, 254 Pa. 231.

The sale by two only of the executors is therefore void. The decedent's will says that John shall occupy the house until the sale shall be made by the executors. The valid sale has not yet been made. The purchaser at the invalid sale, has acquired no right whatever, to the land. His ouster of John is without law. In this ejectment, John must, as has decided the learned court below, recover. The judgment is

AFFIRMED.